IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NO. 149 OF 2020 & NO. 15 OF 2021

(*Originating from the Resident Magistrate Court of Kisutu in Criminal Case No. 149 of 2017, before Hon A.W. Mbando, SRM*)

CUTHBERT NAPEGWA KISHALULI.....1ST APPELLANT

JOHN HUGO KINYAKI

@MARTINI LINDAZI.....2ND APPELLANT

OBBY JOHN KINYAKI..... .....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

13th December,2021 & 11th March,2022

E.E. KAKOLAKI J.

This is a consolidated appeal preferred by the first appellant in Criminal Appeal No. 149 of 2020 and second and third appellants, jointly and together in Criminal Appeal No. 15 of 2021, as both appeals originate from the same criminal case. It is of interest to note from the outset that, before the Resident Magistrate Court of Dar es salaam Region at Kisutu, in Criminal Case No. 149 of 2017, appellants were charged with four different offences in four counts namely, **Conspiracy to Commit an Offence**; Contrary to

section 384, **Forgery**; Contrary to section 333,335(a) and 337 (for the 2nd appellant only), **Obtaining Money by False Pretence**; Contrary to Section 302, all three counts preferred under the Penal Code, [Cap. 16 R.E 2002] and **Money Laundering**; Contrary to sections 3(x), 12 (a) and 13(1) (a) of the Anti-Money Laundering Act, No. 12 of 2006 as amended as. This was after substitution of the charge for the second time on 16/07/2019. They were however, found not guilty and acquitted on the 1st, 2nd and 4th counts while jointly and together found guilty and convicted with the third count only of Obtaining Money by False Pretence, before were sentenced to pay fine of Tshs. 3,000,000/= each or serve 3 years imprisonment in default in which all of them managed to pay fine. Further to that, they were both ordered to refund the sum of USD 2,045,400.00 to the victim (Jingsong Shao) of Holism Group and in case of default within six (6) months, then the Republic will have the right to sell their properties to effect the court's order. It is from that decision which aggrieved the appellant these appeals have been preferred.

For the purposes of this appeal, I find it unnecessary to reproduce the particulars of offence in the 1st, 2nd and 4th counts in which appellants were acquitted but rather concentrate with the ones in the third count, subject of

these appeals. On the third Count, it was alleged by prosecution that, on diverse dates between 1st July 2015 and 30th September 2015, within the city and region of Dar es Salaam, with intent to defraud, appellants obtained money amounting to United states Dollars Two Million Forty Five Thousand Four Hundred (USD 2,045,400) only, from JINGSON SHAO by falsely pretending that, they will supply 500 Kilograms of gold to Holism Group Limited through the Company Known as Golden Shark Mining (T) Limited, the fact they knew to be false.

When they were called to answer to their charges, all appellants flatly denied their accusations, something which necessitated the prosecution to paraded six (6)witnesses and produced in court 22 exhibits in a bid to prove its case, while Appellants fended themselves and had neither witnesses to call nor exhibits to tender. In the upshot and as alluded to above, the trial Court was satisfied that, prosecution accusations regarding third count were proved to the hilt, where upon appellants were convicted and sentenced accordingly as stated above.

Briefly the facts that gave rise to this appeal as gleaned from the record are styled as follows. Jingsong Shao (PW4), a Chinese national, General Manager and sole proprietor of Holism Group Limited (exh. P9 and P10 referred), a

company registered in Hong Kong dealing in mineral business, exploration, mining and trading in mineral products, in 2015 was introduced to Mr. Kingdon who was by then working at the Embassy of Malawi in China. PW4 had a discussion with him on mineral business opportunities in Tanzania as Kingdon convinced him that he had friends in Tanzania dealing in that field whom he had promised to introduce to. In July, 2015, the two (Mr. Kingdon and PW4) visited Tanzania and welcomed by Mr. Happy and Tony Malawians and friends to Mr. Kingdon, who took them to Delicore Metal Company whose shareholders are the 2nd and 3rd appellants and CEO and sole signatory of the company's account No. 0100095361111 maintained at I&M Bank respectively. The 2nd appellant who also introduced himself to PW4 as company lawyer apart from being CEO, introduced to PW4 the 3rd appellant, a director of Golden Shark Mining (T) Ltd as a business tycoon in minerals, trading both in Tanzania and DRC Congo, whom they discussed about mineral business undertakings and finally concluded a deal by signing a sale and purchase agreement on 09/07/2015 (exh.P12) for supply of 500kgs of gold nuggets or raw gold to Holism Group Limited through PW4. As to the mode of payment it was discussed and agreed that, since the 1st appellant had no export licence and at the same time not fluent in English, then

payments be effected through 2nd appellant's company (Delicore Metal Co.), as third party to agreement and guarantor to their business undertakings. Through a pro-forma invoice dated 09/07/2015 (exh.P13) issued by the 2nd appellant's company, PW4 was asked to deposit into the later's company account USD 1,145,400.00 as money to serve as tax, insurance and logistic fees for the intended shipment of 500kg gold nugget, the money which was deposited in three instalments of USD 946,450 and USD 199,000 (exh. P16 collectively) wired by Gold Target Holdings Ltd and USD 400,000 (exh.P18) and USD 500,000 for clearance purposes (exh.P19) wired by Gold Target Holdings Ltd and Holism Group Ltd respectively, after PW4 had received payment instructions from the 2nd appellant through email communications to pay them. The said money was paid by the two sister companies from the same family following Entrusted payment agreement dated 21/07/2015 (exh.P20) entered between Holism Group Ltd and Gold Target Holdings Ltd for the later to effect payment on behalf of the former, which agreement was made purposely to make the payments legal in case of any trouble between Holism Group Ltd and Delicore Metals Co. Ltd.

It appears despite of all payments effected by PW4 (Holism Group Ltd) through the said two sister companies nothing came forth from the

appellants as the promised supply of 500kgs of gold nuggets by the 1st appellant to Holism Group Ltd, was not shipped to her, the result of which was to report the matter to the Police through Financial Crime Unit (FCU) as the appellants were at that time not picking PW4's calls, while 2nd appellant's office remain closed and changed its use into clinic. Investigation of the matter was mounted and finally the appellants booked with criminal charges in four counts as stated above but convicted with the 3rd count only of Obtaining Money by False Pretence which conviction, sentence and compensation order they are now challenging.

As alluded to herein above in these consolidated appeals, appellants are challenging conviction, sentence and compensation order imposed to them. In his appeal the 1st appellant relied on eight (8) grounds of appeal which can be summarized as follows:

First, the trial court was in error to find the appellant was guilty of the offence of Obtaining money by false pretence, **Second,** the trial court failed to analyze properly the prosecution evidence as it did not implicate the appellant, **Third,** the trial Court erred in law and fact to hold that there was valid and binding contract between appellant and PW4, **Four,** the trial court was in error to order compensation without proof that appellants benefited

from illegal transaction. **Five,** the trial court erred in ordering sale of appellants property without ascertaining the said property. **Six,** the trial court erred in law in finding that PW4 had a genuine claim, while the purported transaction was tainted with illegality, **Seven**, the matter was civil and not criminal, and **Eighty**, that the trial court erred in admitting and relying on exhibit P12.

On the other hand, 2nd and 3rd appellants manifested their dissatisfaction with the trial court's decision by advancing five (5) grounds of appeal which are almost the same with those of 1st appellant, and the same can be paraphrased as follows; ***First,*** that the court erred in law and fact by shifting the burden of proof from prosecution to the appellants and continue to convict and sentence appellants without proof of the 3rd count beyond reasonable doubt. **Second**, the trial Court erred in law and fact by convicting the appellant with the count of obtaining money by false pretence while the entire evidence proves that the claim is of civil nature. **Third**, the trial court convicted appellants while the essential ingredients necessary to constitute the offence of Obtaining Money by False Pretence were not proved. **Four**, the trial Court wrongly convicted the appellants basing on the documents whose contents were not read out to the appellants for them to understand

their nature and substance after being cleared for admission. **Five**, the trial Court failed to properly evaluate the evidence on record as a result arrived at a wrong conclusion.

It is on basis of those grounds, appellants pray the court to allow their appeal by quash their conviction and set aside the sentence and compensation order thereto.

During hearing of the appeal, all parties were represented, whereas the 1st appellant hired legal services of Mr. Jamhuri Johson, and 2nd and 3rd appellants Mr. Nehemia Nkoko, both learned advocates, the respondent enjoyed the service of Cecilia Mkonongo, learned Senior State Attorney, and with leave of the court both parties argued their appeal by way of written submission. I am thankful to the learned counsels from both sides for filing their detailed and well-researched submissions as scheduled, which in turn has necessitated this judgment. In his submission, counsel for the first appellant sought leave of the court and addressed the grounds of appeal by consolidating ground No. 1 and 2, grounds 3,6,7 and 8, grounds 4 and 5, while counsel for 2nd and 3rd appellants too sought leave of the court and argued the appeal by consolidating grounds No. 1 and 5 while the 2nd, 3rd and 4th ground were argued separately. In her reply submissions, respondent

counsel chose to group the grounds of appeal which according to her appeared to be addressing the same thing while arguing separately the rest.

While I am appreciative of the detailed submissions filed by all parties as alluded to above, I do not intend to reproduce them all, instead I will be referring them in the course of addressing and determining the grounds of appeals. However, what is gathered from both appellants' grounds of appeal as well as the submissions from both sides is that generally the appellants' central complaints which seem to be repetitive or one and the same may be reduced down into four issues for determination by the court, going thus:

(1) Whether conviction of the appellants was properly arrived at by the trial court upon satisfying itself that, ingredients of the offence of Obtaining Money by False Pretence were proved beyond reasonable doubt in answering the 1st and 2nd grounds of appeal by 1st appellant and 1st, 3rd and 5th grounds of appeal by the 2nd and 3rd appellants.

(2) Whether the prosecution exhibits admitted in court and not read aloud in court were properly and legally relied upon by the trial court to convict the appellants to answer ground No. 4 for the 2nd and 3rd appellants.

(3) Whether the case was of civil nature and not a criminal matter for want of specific performance of the contract between the 1st appellant and PW4 to answer the 3rd, 6th 7th and 8th ground of appeal by the 1st appellant and ground No. 2 for the 2nd and 3rd appellants.

(4) Whether compensation and sale order in default of payment of fine were properly and legally issued in accordance with the law to answer the 4th and 5th grounds of appeal by the 1st appellant.

Considering the issues above raised and for the purposes of proper and smooth determination of the grounds of appeals as raised by the appellants, I find it appropriate in this judgment to start addressing the 2nd issue as whether the prosecution exhibits admitted in court and not read aloud in court were properly and legally relied upon by the trial court to convict the appellants. Arguing in support of the appeal, it was Mr. Nkoko's submission that, 2nd and 3rd appellants were convicted on the third count of Obtaining Money by False Pretence, basing on documentary evidence tendered by respondent especially exhibits P3,P4,P5,P6,P7,P8,P13, P16,P18 and P19 while the said documents and other documentary exhibits tendered by the respondent in court were not read out aloud by the witnesses who tendered them after clearance for admission the omission which is fatal, hence same

must be expunged from the records for ceasing to have any evidential value. Mr Nkoko referred the court to the case of **Stephen Jonas and Another v The Republic,** Criminal Appeal No. 337 of 2018, (CAT-unreported), and submitted that, after expunging the said documents from the record there will be no other evidence to link the 2nd and 3rd appellants with the offence of obtaining money by false pretence with which they were convicted and sentenced with. In another point he submitted that, Pw6 tendered documents but it was not clear on how he obtained the same as he did not tender certificate of seizure. He placed reliance in the case of **Azimio Machibya Matonge Vs. Republic**, Criminal Appeal No. 35 of 2016 (CAT-unreported).

In response, Ms. Mkonongo conceded to Mr. Nkoko's submission that, the proceedings are silent on the complaint prosecution witnesses' failure to read out tendered documentary exhibits after being cleared for admission and consented for them to be expunged from the record. However, she was of the view that, even if the same are expunged, prosecution case will remain unaffected evidence from oral and elaborate testimony of its witnesses. She referred the Court to pages 84, 85, 90, 96 and 97 of the proceedings where the contents of exhibits P12 (agreement between the complainant and 1st

appellant), 15 and 16, were well explained by PW4 and at page 102 where exhibit P20 was explained by PW5. Ms. Mkonongo contended that, the essence of reading the contents of the document is to make the adverse party aware about the case facing them. It was her view that, since the appellants cross examined the witnessed by using documents exhibits P11, P7, and P6, this implies that, they understood the contents of the documents. The learned counsel placed reliance in the case of **Huang Qin and Another Vs. Republic,** Criminal Appeal No 173 of 2018, (CAT-unreported) where the Court held that, even though the disputed exhibits were expunged still they were sufficiently explained by prosecution witnesses. It was her submission that, there is no any document admitted in this matter whose content was not explained by the prosecution witnesses.

In a short rejoinder Mr. Nkoko insisted that, the contents of all documents were introduced before the court through back doors, since the same was not read out after admission. Concerning the cases cited by the Respondent counsel, it was to his response that, the same are outdated as there is new principle derived from the case of **Stephen Jonas and Frank Hamis** (Supra) and maintained that, the said documents should be expunged from the record.

It is true and I embrace Mr. Nkoko's submission that, failure to read aloud the document after its clearance for admission is prejudicial to the accused's right to fair hearing for denying him with an opportunity to understand the nature and contents of the document tendered against him. There is a a plethora of authorities clarifying that stance. In the case of, **Robinson Mwanjisi Vs. R**, [2003] TLR 218 the Court of Appeal observed explained that:

> *"…whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out."*

The consequences of not reading aloud the document after its admission are well explained in various cases including the cases of **Robert P Mayunga & Another Vs. R,** Criminal Appeal No 514 of 2016 (CAT-Unreported), **Hussein Said Said @baba Karimu @ white and Another Vs. R,** Criminal Appeal No 298 of 2017 (CAT-unreported) and **Kifaru Juma Kifaru and Others Vs. R**, Criminal Appeal No 126 of 2018 (CAT-unreported). In the case of **Robert P Mayunga & Another** (supra) the Court stated thus:

> *"Failure to read out to the appellant a document admitted as exhibit denies the appellant the right to know the information contained in the document and therefore puts him in the dark*

not only on what to cross examine but also to effectively align or arrange his defence. The denial, therefore, abrogates the appellants' right to fair trial…"

From the above cited authority, the rationale behind reading out a document after admission is very clear as it is to make the other party aware of the contents of the said document so as to be in a position to make an informed and rational defence as rightly submitted by Ms. Mkonongo. In the case of **Shabani Hussein Makora Vs. R**, Criminal Appeal No. 287 of 2019, (CAT-unreported) the Court of Appeal explained the essence of reading out exhibits immediately after being cleared for admission, and had this to say:

"It is settled law that, whenever it is intended to introduce any document in evidence, it should be admitted before it can be read out. ***Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or understanding the contents of the exhibits because each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidences adduced or observations filed or made with a view to influencing the court's decision****." (Emphasis is mine)*

The issue which follows therefore is whether the tendered exhibits in the present appeal should suffers the consequences of being expunged from

record. It is worth noting that every case is decided basing on its own fact, as there are some cases in which the court refrained from expunging the documents as suggested by Mr. Nkoko and conceded by Ms. Nkonongo after noting that, the same were well explained by witnesses. Basing on the facts of this case, I find the said principle applicable in the present case. In arriving to that finding, this court is guided by principles in the case of **Chrizant John Vs. R,** Criminal Appeal No. 313 of 2015 (CAT-unreported), **Ernest Jackson @Mwandika upesi & Another Vs. R**, Criminal Appeal No. 408 of 2019 (CAT-Unreported) and **Stanley Murithi Mwaura Vs. R,** Criminal Appeal No. 144 of 2019, (CAT-unreported) duly delivered on 22nd November 2021. For instance, in the case of **Chrizant John** (supra) the Court of appeal had this to say:

> *In circumstances of the instant case however we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayumbi, the Doctor who conducted autopsy, and because the evidence of that witness capitalized on exhibit P1* ***and he explained in details in the deceased cause of death also that his advocate was give chance to cross examine him, it cannot be accepted that the appellant was denied opportunity to know the contents of exhibit*** *P1. So is the question of the sketch map because Pw3 Inspector*

Angelo was called to testify and clarified the contents of that document. (Emphasis supplied)

In the case of **Ernest Jackson @ Mwandika Upesi & Another** (supra) when faced with similar situation, the Court of Appeal had observed thus:

> *"Although the record does not expressly indicate that the said documents were methodically read out as indicated it is noteworthy that in the rest of their respective evidence in chief the witness canvassed the contents of the documents* ***and there after they were cross examined so substantially on the documents by the defence counsel to leave no doubt that the appellants and their Counsel were fully abreast of the content of the two exhibit.*** *Given these facts, it cannot be said that the appellants were denied to know the contents of the documents. We would follow the course we took in* ***Chrisant John Vs. Republic****, Criminal Appeal No 313 of 2015 (Unreported)* ***where even though the contents of certain documentary exhibits were not methodically read out after admission, we ignored the anomaly as were satisfied that the witness who tendered them testified fully on their contents."*** *(Emphasis supplied)*

With the above understanding, and for justification of the above finding of this court, I will examine each disputed exhibits as listed by Mr. Nkoko, that

is exhibit P3, P4, P5, P6, P7, P8, P13, P16, P18 and P19. Starting with exhibit **P4** collectively, these are documents used by appellants to open bank account in I&M Bank, which were well explained by PW3 at page 56 of the proceedings that the 2nd and 3rd appellants' company (Delicore Metal CO. Ltd) had an account with I&M Bank and that, it is from that account exhibit **P6** (Bank account statement) was generated. Appellants' advocates cross examined on these documents, and appellants never denied to have opened the bank account. Next is exhibit **P5**, proforma invoices, issued by Delicore Metal Co. Ltd justifying transaction of crediting 2nd and 3rd appellant's company account and the same was well explained at page 59 of the proceedings. **P6** is bank statement used in all transaction from 30/06/2015 up to 18/10/2017, in which the same was well explained by Pw3 at Page 61. It was also cross-examined on by appellants through their advocates. Notably, it is not expected that a witness would read every detail of this entire document because not every detail would necessarily relate to the disputed money, thus the relevant substance of the document was brought to the knowledge of the appellants and their respective advocates hence meeting the objective of reading the document immediately after admission. See the case of Stanley **Murithi Mwaura** (supra).

Exhibit **P7,** is the cheque dated 14/08/2015 and the same was explained to the appellants at page 62 of the proceedings by PW3. Even if the same was not read out still, I would hold it did not prejudice the appellants as to hold otherwise would be tantamount to demand too much from the trial court as the appellant had an opportunity to see it before its tendering in court. The Court of Appeal when faced similar scenario in the case of **Stanley Murithi Mwaura** (supra), where the contents of the cheque was not read out aloud in court had this to say:

> *"In the circumstances,* ***to hold that the appellant was prejudiced by not reading the cheque would be expect too much from the trial court for nothing. We cannot therefore expunge any of the cheques****, irrespective of whether* ***they were read over to the appellant or his advocate*** **or not.**" (Emphasis is mine)

P8 is the swift messages showing the process of receiving and/or depositing money using BOT method. The same was well explained by PW3 at page 64 of the proceedings and rightly cross examined as seen at page 66 of the proceedings. **P13**, a pro-forma invoice dated 9th July 2015 issued by Delicore Company to PW4 requiring him to pay the money in their account No. 010095361111 in I& M bank, this was also explained at page 85.

P16- T.T showing that the money was credited to Delicore Account the same was well explained at page 96 and 97 by PW4. **P18** is T.T dated 31/07/2015, and the same was explained at page 98 by Pw4. Exhibits P16,17,18 and 19 were also cross examined on at page 104 and 108 of the proceedings something proving that appellant understood their contents ready to marshal their defence against them if any existed.

In light of the above demonstrated explanations by the prosecution witnesses over the tendered exhibits, I am contented and therefore remain without any grain of doubt that, the appellants were in no way prejudiced by failure of prosecution witnesses to read the exhibits tendered in the trial court. In the event this ground has no merit and it is here by dismissed.

Next for determination is the first issue as to whether conviction of the appellants was properly arrived at by the trial court upon satisfying itself that, ingredients of the offence of Obtaining Money by False Pretence were proved beyond reasonable doubt. Submitting on this point, Mr. Jamhuri argued that, proof in criminal cases lies on prosecution side. He cited section 3 (2) (a) of the evidence Act. He submitted further that, for offence of obtaining money by false pretence to stand, it must be proved that the alleged money was in fact paid to the appellant but in this case there is

nothing on record to prove that, the 1st accused received such money deposited in the 2nd and 3rd appellants' company account by the complaint. He contended that, according to PW3's testimony, the said money was paid to Delicore Metal Company Limited for purchase of mining equipment and not the 1st appellant, and the purpose of payments to the 2nd and 3rd appellant was confirmed to be genuine payments by PW3 after calling PW4, so it was wrong for the 1st appellant to be convicted as the money was neither paid to him nor his company. Thus the necessary ingredient of obtaining from the complainant as dictated in section 302 of the Penal Code was not proved. On the other hand he argued, the fact that appellants were acquitted of the offence of conspiracy is a proof that, the 1st appellant was not privy to the transactions between the complainant and 2nd and 3rd appellants, since PW4 also when cross-examined at page 103 said, he never received a letter from Golden Shark Mining (T) Ltd authorizing Delicore Metals Co. Ltd to receive money on their behalf. In his view, had the trial magistrate considered all this evidence and 1st appellant's defence would have found otherwise against the 1st appellant and acquitted him of the offence he was convicted with. He relied on the case of **Jonas Bulai Vs. R**,

Criminal Appeal No. 49 of 2006 (CAT-unreported) and **Ahmed Said Vs. R**, Criminal Appeal No. 291 of 2015 (CAT-unreported)

On his side Mr. Nkoko for the 2nd and 3rd appellants argued that, the case was not proved beyond reasonable doubt as the evidence reveals that, there was contractual agreement between complainant Company (Holism Group Ltd) and the 1st appellant's Company (Golden Shark Mining (T) Ltd), in which it required proof of counts conspiracy and forgery amongst the appellants with view of obtaining by false pretence the alleged money. He said, since the appellants were acquitted in conspiracy and forgery charges automatically the charge of obtaining money by false pretence could not stand against them. That aside, relying on the case of **Jonh Paul @Shida and Another Vs. R**, Criminal Appeal No. 335 of 2009 (CAT-unreported) as cited in the case of **Steven Salvatory Vs. R**, Criminal Appeal No. 275 of 2018 (CAT-unreported), he said the act of charging appellants with both offences of Conspiracy and Obtaining Money by False Pretence rendered the charge incurably defective. Mr. Nkoko added, the charge was also defective since the evidence adduced in court in support of the 3rd count was at variance with the charge. It was his argument that, the particulars of the offence as stated in the 3rd count are that, all appellants obtained money

amounting to USD 2,045,400.00 from **Jingsong Shao** (PW4) while the evidence on record shows that, the said money was transferred by Gold Target Holdings Limited to Delicore Metals Company Ltd, Account No. 01009531111, maintained at **I & M Bank Limited** and not PW4. In his argument, the alleged obtained money under false pretence by the appellants was the property of Gold Target Holding as seen at page 34 of the typed judgment and not PW4 as stated in the charge sheet. He submitted, the said variance in the evidence adduced against the particulars of offence in the 3rd count is incurable defect as it goes to the root of case (the 3rd count) in which the 2nd and 3rd appellants were convicted of and sentenced accordingly, hence section 388 of the Criminal Procedure Act, [Cap. 20 R.E 2019] cannot cure it. To fortify his stance the Court was referred to the case of **Noah Paul Gonde and Ramadhan Hassan Vs. DPP**, Criminal Appeal No. 456 of 2017 (CAT-unreported) where the Court of Appeal held that, variance or discrepancy relating to the weapon alleged to be used to threaten the victim and the ones mentioned in the charge sheet was not minor contradictions as it went further to touch the weight of evidence something which did not support the charge. In the end the court adjudge the charge of Armed Robbery was rendered incurably defective as

it was not proved to the required standard. On another beat to the prosecution case Mr. Nkoko argued, the chain of custody on the prosecution exhibits relied on by the court to convict the appellant was broken as the record is barren on how they landed into the hands of PW6 since seizure certificate was never tendered in court to prove that fact. On the basis of all deficiencies in evidence, Mr. Nkoko invited the court to find the prosecution case was not proved beyond reasonable doubt against the appellants, hence quash the 2nd and 3rd appellants' conviction and set aside the sentence and compensation order effected to them.

In response to the above submissions Ms. Mkonongo while in agreement with Mr. Johnson's proposition that in criminal cases the prosecution bears the burden of proof to the hilt as provided under section 3(2)(a) and 110(1) and (2) of the Evidence Act, [Cap.6 R.E 2019], she strongly resisted the appellant's submission that, the count of obtaining money by false pretence was not proved against them. In her view, the available evidence proved the case against all appellants beyond reasonable doubt. She contended that, for the offence of obtaining money by false pretence to be complete it must be proved that, there was false representation and the victim acted upon that false representation which can be made either orally or in written form.

Citing the provisions of section 302 of the Penal Code, Ms. Mkonongo went on to submit that, false pretence simply means making an intentional statement with intent to defraud the victim in order to obtain title or property from the victim, and that it is not necessarily that false representation be made orally as it can as well be in written form. In her further view she argued, the fact that in the case at hand there was written agreement that does not imply that the case was of civil nature as what is important ingredient is the proof to misrepresentation with purposes of obtaining money by false pretence. She said, PW4 proved before the court on how he entered into purchase agreement (contract) with the 1st appellant in which the second appellant was privy to, where the appellants had to deliver gold nuggets. And that, after the 2nd appellant misprepresented himself and his company orally as a genuine party to the agreement ready to received money from the complainant for and on behalf of Golden shark Mining (T) Ltd as purchase price of gold nuggets, with oral consent from the 1st appellant, PW4 wired the money to the second appellants' bank account on different installments for that purpose, the money which was withdrawn by the third appellant. According to her, all appellants were involved in all these transactions. Ms. Mkonongo contended that, complainant (PW4) hopelessly

waited for quite a long time to hear from the appellants without response from their side, as their phone were not reachable and when he went to their office, appellant had already shifted to unknown place without notifying him.

In further submission Ms. Mkonongo argued, appellants' companies were created for the purpose of deceiving, and that appellants had intention of deceiving the complainant because after receiving the money, they stopped communicating with him. She went on distinguishing the cases cited by the appellants with the circumstances of the case at hand. In concluding, Ms. Mkonongo maintained that, the money handed to the appellants were not entrusted to them rather the complainant acted on their false presentation that, they would deliver to him gold nuggets which supply they did not make. On the submission of broken chain of custody as claimed by appellants she argued the assertion is unfounded as PW6 clearly explained how he obtained the documents and the same did not exchange hands, therefore could not easily be tempered with. She therefore implored the court to dismiss the grounds of appeal.

In his rejoinder submission Mr. Nkoko intimated that, no doubt the Respondent conceded the 1st appellant never received money from PW4 or any person acting on his behalf therefore the case against him was not

proved as for the person to be convicted with the offence of Obtaining Money by False Pretence, it must have been proved first that he received the said money from the complainant. In the same vain he submitted, in this case the payments made to the 2nd appellant's account was not made by PW4 rather by the company called Gold Target Holding Limited who going by evidence adduced never exhibited the purposes of the said payments in the account of Delicore Metals Company Ltd, thus the appellants were wrongly convicted with the offence of Obtaining Money by False Pretence whilst the money was not paid by PW4 mentioned in the 3rd count.

It is true and I agree with counsels for the appellants that, under sections 3(2)(a) and 110(1) and (2) of the Evidence Act, proof in criminal cases lies on the prosecution and that, the standard is beyond reasonable doubts. This stand of the law is well stated in the case of **Said Hemed Vs. R** [1987] T.L.R 117 where the Court held thus:

> *"…in criminal cases the standard of proof is beyond reasonable doubt, where the onus shifts, it is on a balance of probabilities."*

I am also at one with Ms. Mkonongo in her proposition to the definition of the term *"false pretence"* that, it simply mean making an intentional

statement with intent to defraud the victim in order to obtain tittle or property from the victim, and that it is not necessarily that false representation should be made orally as the same can be also made by **conduct**. The proposition that it can be made by conduct is obtained from the definition of the term *"false pretence"* as given by **A Dictionary of Law**, Elizabeth Martin, 5th Ed (2002) Oxford University Press at page 198 to mean:

> *"The act of misleading someone by a false representation, either by words or **conduct**." (Emphasis is mine)*

The law under section 302 of the Penal Code, [Cap. 16 R.E 2019] reads thus:

> *302. Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of an offence and is liable to imprisonment for seven years.*

From the above definitions and the provision of the law under section 302 of the Penal Code, it is evident to me that, for the offence of Obtaining Money by False Pretence to be established the following ingredients must be proved:

> *(a) False pretence or misrepresentation by words or conduct.*

(b) Intent to defraud or mislead the person to whom such false pretence or misrepresentation is made.

(c) Obtaining from the person (complainant) or inducing him to deliver to anything capable of being stolen.

Now for the obvious reasons to be disclosed soon in the course of this judgment, I wish to consider first and determine the complaint by Mr. Nkoko that, the charge against the appellants on the 3rd count is incurably defective as there is variance between the charge and the evidence adduced in court. It is his assertion that, the fact that the disputed money (USD 2,045,400) was obtained from the Jingson Shao (PW4) as stated in the 3rd count is at variance with the evidence tendered in court showing that money was paid in the 2nd appellant company's account by Gold Target Holding Limited and not PW4. This submission was not countered by the Respondent in her reply submission. For the purposes of better understanding and disposal of the complaint I find it imperative to reproduce the said 3rd count of the charge sheet:

3rd COUNT FOR ALL ACCUSED PERSONS

STATEMENT OF OFFENCE

OBTAINING MONEY BY FALSE PRETENCE; *Contrary to Section 302 of the Penal Code, [Cap. 16 R.E 2002]*

PARTICULARS OF OFFENCE

JOHN HUGO KINYAKI@ MARTINE LINDAZI@MARTIN MARK LINDAZI, OBBY JOHN KINYAKI *and* ***CUTHBERT NAPENGWA KISHALULI*** *on diverse dates between 1st July, 2015 and 30th September, 2015 within the City and Region of Dar es salaam, with intent to defraud, obtained money amounting to United States Dollars Two Million, Forty Five Thousand, Four Hundred (USD 2,045,400) from* ***JINGSON SHAO*** *by falsely pretending that they will supply 500 kilograms of gold to HOLISM GROUP LIMITED through the company known as GOLDEN SHARK MINING LIMITED, the fact they knew to be false.*

As rightly stated above for the offence of obtaining money by false pretence to be established the third ingredient that, a property or thing capable of being stolen was in deed obtained from the complaint, must be stated in the charge sheet and proved. In the present case there is no dispute as per the agreement for sale and purchase of 500 kgs of gold nuggets between Holism Group Limited and Golden Shark Mining Company of the 1st appellant (exh. P12) the buyer (complainant) is Holism Group Limited as the same was signed for and its behalf by Jingson Shao (PW4). It is also uncontroverted fact that, as per evidence of PW3 at page 59 and PW4 at pages 96 – 109 of the proceedings that, the disputed money was paid in the 2nd and 3rd

appellants company account No. 0100095361111 maintained at I&M Bank, by Holism Group Limited as party to the agreement and Gold Target Holdings acting for and on behalf of Holism Group Limited. Proof of payments is elaborate as per Delicore Metal Co. Ltd bank account statement operated at **I&M** Bank (exh. P6), T.T (exh. P16 collectively) and (exh. P18) effected by Gold Target Holding Ltd and T.T (exh.P19) effected by Holism Group Limited as well as Entrusted payment agreement dated 21/07/2015 (exh.P20) entered between Holism Group Ltd and Gold Target Holdings Ltd, for the later to effect payment on behalf of the former.

In this case the prosecution was duty bound to prove to the court that, the complained of money was fraudulently obtained from Jingson Shao (PW4) as stated in the charge sheet and not Holism Group Limited, the real complainant. The vice versa is the truth as the evidence led by PW3 and PW4 in court indicates that, the money was partly paid by Holism Group Limited and the rest by Gold Target Holding Ltd for and on behalf of the Holism Group Limited and not Jingson Shao (PW4) as claimed in the 3rd court. It is from that fact I hold, the charge in the 3rd count on the offence of obtaining money by false pretence against all appellants is at variance with the evidence tendered in court. The Court of Appeal in the case of

Mohamed Juma @ Mpakama Vs. R, Criminal Appeal No. 385 of 2017, (CAT-unreported) when confronted with a situation akin the present one on the discrepancy between the charge and the evidence, had the following to say:

> *"We have carefully read the particulars of the third count of being found in unlawful possession of one arrow and one spear. Learned counsel is correct to point out on the divergence between the particulars of the offence and evidence of PW1 and PW3 on the type of weapons they found in possession of the appellant. Apart from unresolved question of facts regarding whether the appellant was arrested inside the game reserve or along the road outside the reserve, we think, the discrepancy between the type of weapons mentioned in the particulars of the charge, and the weapons mentioned by the prosecution witnesses is not minor, it goes to the root of the third count."*

Similarly in the case of **Masota Jumanne Vs. Republic**, Criminal Appeal No. 137 of 2016 (CAT-unreported) the Court of Appeal when dealing with the same predicament of the variance between the charge sheet and evidence adduced in court on the type of the properties stolen from the complainant observed thus:

"In a nutshell, the prosecution evidence was riddled with contradictions on what actually was stolen from PW1. Such circumstances do not imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of the evidence which is not in support of the charge."

Again in a very recent decision the Court of Appeal while referring to the case of **Masota Jumanne** (supra) when discussing on discrepancy of the evidence in court versus the alleged weapon used to threaten the victim of Armed Robbery as per the charge sheet had this to say:

"We entertain no doubt that in this cas there was a discrepancy relating to the weapon that was alleged to be used to threaten the victim (PW6). ***While the charge alleges that the appellants used an iron bar and a machete in order to obtain and retain the goods, the evidence revealed that they has a bag with two hammers. More interestingly, PW6 did not even say that the said hummers were used to threaten him****. As was stated in* ***Masota Jumanne's case*** *(supra), the discrepancy was not minor contradictions. Indeed,* ***we find that it went to the weight of evidence which did not support the charge****." (Emphasis supplied)*

The position in the above cited cases is alike to the present case hence the principle therein is applicable in the circumstances of this matter. The

evidence as adduced by PW3 and PW4 as to who is the victim (complainant) whom the alleged USD 2,045,400 was obtained from, it points to none else than Holism Group Limited. While the charge on the third count alleges that, the person whom the said money was fraudulently obtained from by the appellants for the purposes of supply of 500kg of gold nuggets is one Jingson Shao (PW4). No doubt this is an apparent discrepancy on who exactly is the victim (buyer) of the said gold nuggets whose money was obtained fraudulently or under false pretence as opposed to the one mentioned in the 3rd count since the sale and purchase agreement of gold nuggets exh. P12, proves it is Holism Ground Limited and not PW4 who only signed the agreement (exh. P12) for and on behalf of the victim. The discrepancy in my firm opinion goes to the weight of evidence which is not in support of the charge as the fact as to who is the complainant is an essential ingredients necessary to constitute the offence of Obtaining Money by False Pretence, hence it has to be stated in the charge sheet and proved by prosecution beyond reasonable doubt which is not the case in this matter. It is from that background I hold, the charge was defective for wrongly stating the victim to be Jingson Shao (PW4) instead of Holism Group Limited who paid the alleged money, hence the case against them could not have been said to

have been proved. To that end I would confidently conclude, the charge against the appellants in the 3rd count was incurably defective as rightly submitted by Mr. Nkoko learned advocate, thus appellants' conviction was improperly arrived at by the trial court. The point of defectiveness of the charge under grounds of appeal in this issue disposes of this appeal and I see no reason to further determine the rest of the points as that is tantamount to academic exercise in which I am not prepared for.

All that said and done, I find the appeal is meritorious and the same is allowed. The conviction entered against the appellants on the offence of Obtaining Money by False Pretence is quashed and the sentence and compensation orders meted on them set aside. Since the appellants are not incarcerated, I make no further order.

It is so ordered.

DATED at DAR ES SALAAM this 11th day of March, 2022.

E. E. KAKOLAKI

JUDGE

11/03/2022.

Judgment delivered at Dar es Salaam in chambers this 11th March, 2022 in the presence of all three appellants, Mr. Benson Florence learned Counsel for the 1st appellant, who is also holding brief for Mr. Nehemia Nkoko, advocate for 2nd and 3rd appellants and Ms. Monica Msuya, court clerk and in the absence of the Respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
11/03/2022